Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

CARVER DAN PEAVY and SALLY PEAVY,

Cross-Petitioners,

v.

WFAA-TV, INC. and ROBERT RIGGS,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a cause of action exists under the civil remedy provision of the federal wiretap act against persons who violate 18 U.S.C. § 2511(1)(a) by "intentionally . . . procur[ing] any other person to intercept . . . any wire, oral, or electronic communication."

2. Whether the statutory suppression rule of 18 U.S.C. § 2515 prohibits a defendant in a civil lawsuit from introducing the contents of illegally intercepted communications into evidence to defend against state law claims or to support affirmative defenses to liability under the federal wiretap act.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iv
Citations of Opinions Below	1
Basis of Jurisdiction	1
Statutes Involved	1
Statement of the Case	2
A. Statement of Relevant Facts.	3
B. Statement of Relevant Proceedings Below.	5
Reasons for Granting this Cross-Petition	6
A. A Cause of Action Exists Under the Civil Remedy Provision of the Federal Wiretap Act Against a Person Who Violates the Act by Intentionally Procuring Another Person to Commit an Illegal Interception.	7

Contents

	Page
B. The Statutory Suppression Rule of 18 U.S.C. § 2515 Prohibits a Defendant in a Civil Lawsuit from Introducing the Contents of Illegally Intercepted Communications into Evidence to Defend Against State Law Claims or to Support Affirmative Defenses to Liability Under the Federal Wiretap Act.	11
Conclusion	17

TABLE OF CITED AUTHORITIES

Page

Cases:

Forsyth v. Barr, 19 F.3d 1527 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994) 15

Gelbard v. United States, 408 U.S. 41 (1972) 7, 11, 12, 14, 15

Goodspeed v. Harman, 39 F. Supp. 2d 787 (N.D. Tex. 1999) 4

Williams v. Poulos, 11 F.3d 271 (1st Cir. 1993) ... 14, 15

Statutes:

18 U.S.C. § 2510, *et seq.* 5

18 U.S.C. § 2510(8) 15

18 U.S.C. § 2511(1)(a) ..... i, 1, 6, 8, 9, 10

18 U.S.C. § 2511(1)(a-d) 8, 10

18 U.S.C. § 2511(2)(a)(ii) 10

18 U.S.C. § 2515 ..... i, 2, 5, 11, 12, 16

18 U.S.C. § 2520 ..... 6, 9, 10

18 U.S.C. § 2520(a) 2, 8, 10

28 U.S.C. § 1254(1) 1

Cited Authorities

Page

Rules:

Fed. R. Civ. P. 56(e) 16

United States Supreme Court Rule 12.5 1

Other Authorities:

S. Rep. No. 90-1097, 90th Cong. 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112 .....7, 8, 12, 15

S. Rep. No. 99-541, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 3555 .....7, 9, 10, 11

CITATIONS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000), *petition for cert. filed*, (U.S. Oct. 30, 2000) (No. 00-691). The opinion of the United States District Court for the Northern District of Texas is reported at *Peavy v. Harman*, 37 F. Supp. 2d 495 (N.D. Tex. 1999). These decisions are reprinted in the appendix to Petitioners' Petition for a Writ of Certiorari.

BASIS OF JURISDICTION

The Fifth Circuit entered its judgment on July 31, 2000. The Petition for a Writ of Certiorari was docketed on October 31, 2000.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court of the United States and is conditional upon this Court's grant of Petitioners' Petition for a Writ of Certiorari.

STATUTES INVOLVED

18 U.S.C. § 2511(1)(a):

> Except as otherwise specifically provided in this chapter any person who —
>
> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
>
> * * *
>
> . . . shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2515:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2520(a):

> . . . any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

STATEMENT OF THE CASE

Dan and Sally Peavy filed this lawsuit to recover civil damages against a local television station, WFAA-TV, Inc. ("WFAA"), and one of its investigative reporters, Robert Riggs, for violations of the federal and state wiretap laws. WFAA and Riggs participated with the Peavys' neighbors to intercept and record the Peavys' private telephone conversations, which they then used and disclosed in the course of investigating a news story. The investigation culminated in a series of highly critical exposés on the local television news.

A. Statement of Relevant Facts.

In early December 1994, Charles and Wilma Harman began using a police scanner to purposefully intercept the cordless telephone calls of their neighbors, Dan and Sally Peavy. Pet. App. 2a. At that time, Dan Peavy was a trustee for the Dallas Independent School District ("DISD"). *Id.*

On December 8, 1994, Charles Harman called WFAA and told a producer that he had evidence of wrongdoing by Dan Peavy. Pet. App. 3a. Riggs called Harman back later that day, and Harman explained that he suspected Dan Peavy of public corruption. *Id.* At that time, Riggs had never heard of Dan Peavy and was not working on any story involving DISD insurance. *Id.*

The next day, Riggs went to the Harmans' home and saw exactly how the Harmans were intercepting the Peavys' calls. Pet. App. 3a. The Harmans told Riggs they were intercepting the Peavys' cordless telephone calls with a scanner and discussed some of the conversations they had intercepted. *Id.* Riggs saw the scanner and listened to a tape of some of the intercepted calls. *Id.* Riggs knew the parties to the calls were not aware of, and did not consent to, the interception or recording. *Id.*

At the conclusion of the meeting on December 9, 1994, Riggs said he wanted any more tapes the Harmans made of the Peavys' calls in the future and instructed the Harmans how they should record the calls. Pet. App. 3a-4a, 16a, 17a. Specifically, Riggs told the Harmans not to turn the recorder off during the calls and not to edit the tapes. *Id.* at 3a-4a, 16a, 17a. The Harmans followed Riggs' instructions. *Id.* at 17a.

Riggs took the Harmans' tape of the Peavys' calls and returned to WFAA's offices to meet with the news director and other WFAA personnel. Pet. App. 4a. Riggs told them about his meeting with the Harmans and played parts of the tape for them. *Id.* Based on what they heard on the tape, they decided to launch an investigation of Dan Peavy and his activities involving insurance programs at DISD. *Id.* at 4a-5a. Riggs directed WFAA personnel to start researching the things they heard on the tape about Dan Peavy and the DISD. *Id.* at 4a.

The Harmans continued to intercept and record (consistent with Riggs' instructions) the Peavys' calls. Pet. App. 16a. Sometimes the Harmans would call Riggs to tell him they had another tape, and sometimes Riggs would call the Harmans to ask if they had more tapes. *Id.* Riggs wanted more information from the Harmans to further his investigation of Peavy, and he asked them to keep him informed about anything else they heard on the Peavys' calls. *Id.* Whenever the Harmans had another tape, Riggs or his producer would go and pick it up. *Id.* at 16a. Riggs had "a lot" of telephone conversations with the Harmans. *Id.*

Harman hated Peavy and wanted to "take him down." *Goodspeed v. Harman*, 39 F. Supp. 2d 787, 792-93 (N.D. Tex. 1999). Riggs encouraged the Harmans to keep intercepting the calls by assuring them he would look into the things on the tapes and telling them he was finding more "stuff" against the Peavys based on the tapes. *Id.* Harman was "delighted" at the prospect of Riggs publicly humiliating Peavy. *Goodspeed* at 792.

Over a period of approximately three months, WFAA and Riggs took eighteen tapes from the Harmans containing

188 conversations between the Peavys and others. Pet. App. 5a. WFAA and Riggs used and disclosed the contents of the tapes extensively in their investigation of Peavy and insurance issues at DISD. Pet. App. 4a-5a. WFAA personnel listened to every one of the tapes and had key conversations transcribed. *Id.* at 4a. They formulated story outlines, prepared memoranda, and conducted interviews and research, all based upon the contents of the tapes. *Id.* at 4a-5a.

Beginning on July 31, 1995, WFAA broadcast several "exclusive" exposé news reports in which investigative reporter Riggs alleged serious wrongdoing by Dan Peavy in connection with DISD insurance programs. Pet. App. 6a-7a, 23a. Several months later, Dan Peavy was indicted on over forty counts of federal offenses related to his involvement with DISD insurance. *Id.* at 68a. He was later acquitted of all charges after a federal jury trial. *Id.*

B. Statement of Relevant Proceedings Below.

The Peavys sued WFAA and Riggs for violations of the federal wiretap act, 18 U.S.C. § 2510, *et seq.* and asserted several pendent state law claims. Pet. App. 7a. The parties filed cross-motions for summary judgment. *Id.* The district court held that the interceptions of the Peavys' calls were illegal under the federal wiretap act. *Id.* at 81a.

The summary judgment evidence offered by WFAA and Riggs consisted mostly of the contents of the illegally intercepted telephone conversations and evidence derived from those conversations. Pet. App. 59a, 74a. The Peavys filed a motion to suppress that evidence under 18 U.S.C. § 2515. *Id.* The district court denied the motion and allowed

WFAA and Riggs to use the contents of the illegally intercepted calls and evidence derived therefrom to (1) attack the Peavys' character, (2) defend against the Peavys' state law claims, and (3) support WFAA and Riggs' affirmative defenses. *Id.* at 59a. The district court ruled in favor of WFAA and Riggs on all of the Peavys' causes of action. *Id.* at 7a. The Peavys appealed the district court's denial of the motion to suppress. *Id.* at 59a. The Fifth Circuit declined to rule on that issue, because the district court's ruling was "only for summary judgment purposes." *Id.*

One of the particular causes of action the Peavys asserted against WFAA and Riggs under the federal wiretap act was a claim for "intentionally . . . procur[ing] any other person to intercept . . . any wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a). Pet. App. 9a. The district court entered summary judgment against the Peavys on that cause of action. *Id.* On appeal, the Fifth Circuit held that a material fact issue existed on the question of whether WFAA and Riggs procured the interceptions. *Id.* 13a. However, the Fifth Circuit held that the cause of action was properly dismissed, based upon its interpretation that 18 U.S.C. § 2520 does not provide a civil remedy for a "procurement" violation under section 2511(1)(a). *Id.* at 10a-13a.

REASONS FOR GRANTING THIS CROSS-PETITION

These two additional issues present compelling reasons for review by this Court. Both are important questions of federal law that have not been, but should be, settled by this Court. These issues are important not only for the case at bar, but because they will undoubtedly arise in many other cases. In 1986, Congress found that "tremendous advances

in telecommunications and computer technologies have carried with them comparable technological advances in surveillance devices and techniques," increasing the risk that communications "may be open to possible wrongful use and public disclosure by . . . unauthorized private parties." S. Rep. No. 99-541, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557. The problem continues to grow, fueled by technological advances and exponential increases in the use of electronic media for business and personal communications. If the Court grants the Petition for Writ of Certiorari in this case, then the Court should also grant this Cross-Petition to consider these additional two issues.

A. A Cause of Action Exists Under the Civil Remedy Provision of the Federal Wiretap Act Against a Person Who Violates the Act by Intentionally Procuring Another Person to Commit an Illegal Interception.

The federal wiretap act represents a "comprehensive scheme for the regulation of wiretapping and electronic surveillance." *Gelbard v. United States*, 408 U.S. 41, 46 (1972). Congress "intended to protect the privacy of the communication itself" and intended for the protection to be "comprehensive." S. Rep. No. 90-1097, 90th Cong. 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112, 2178. From the outset, Congress recognized that prohibition of interception alone would not be enough to protect the privacy of communications. The identities of those involved in unlawful interception "[a]ll too often . . . will go unknown." 1968 U.S.C.C.A.N. at 2156. "Only by striking at all aspects of the problem can privacy be adequately protected." *Id.*

To accomplish those objectives, Congress prohibited three main categories of conduct: interception of communications, use of the contents of an illegally intercepted communication, and disclosure of the contents of an illegally intercepted communication. 18 U.S.C. § 2511(1)(a-d). Sub-paragraph 2511(1)(a), the section at issue here, was intended to "establish[ ] a blanket prohibition against the interception of any wire communication." 1968 U.S.C.C.A.N. at 2180. Within the category of interception, Congress included a prohibition against "procur[ing]" another person to commit an illegal interception. 18 U.S.C. § 2511(1)(a).

The federal wiretap act provides civil remedies for persons whose communications are intercepted in violation of the act: "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate." 18 U.S.C. § 2520(a).

The plain language of section 2520(a) does not except a procurement interception from civil liability. The words "intercepted, disclosed, or intentionally used" describe the category of persons entitled to recover civil damages. They do not limit the categories of violations for which civil damages may be recovered. The categories of persons subject to civil liability under section 2520(a) are "the person or entity which engaged in that violation." The words "that violation" refer back to the three broad categories of conduct prohibited by section 2511(1)(a-d) — interception, use, and disclosure.

The Fifth Circuit ruled (incorrectly) that the civil remedy of section 2520 does not apply to a "procurement" interception under section 2511(1)(a). Pet. App. 13a. The court reached that conclusion by making an unwarranted and erroneous inference from the 1986 amendments to the federal wiretap act. *Id.* at 11a.

Congress amended the federal wiretap act in 1986 to add "electronic communications" to the categories of protected information. 1986 U.S.C.C.A.N. at 3555. Before that amendment, section 2520 read, in pertinent part, as follows:

> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, uses, or procures any other person to intercept, disclose, or use such communications and (2) be entitled to recover from any such person . . . .

18 U.S.C. § 2520 (1970); Pet. App. 10a-11a.

The 1986 amendments substantially rewrote section 2520 and added the term "electronic communication." The current version of the statute reads, in pertinent part, as follows:

> (a) In general. — Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

> (b) Relief. — In an action under this section, appropriate relief includes . . . .

In the opinion of the Fifth Circuit, the failure of Congress to expressly include the term "procure" when it rewrote section 2520 meant that Congress must have intended to eliminate the civil cause of action for procuring an illegal interception under section 2511(1)(a). Pet. App. 12a.

The Fifth Circuit's interpretation directly contradicts the legislative history of the 1986 amendment, which says there is only "one exception" to civil liability under section 2520, and that exception is for conduct described in section 2511(2)(a)(ii) (which is not applicable to the case at bar). 1986 U.S.C.C.A.N. at 3580. Congress could not have intended to exonerate procurement altogether because, as the Fifth Circuit pointed out, procurement can be punished criminally. Pet. App. 12a. There would be no reason, then, for Congress to single out procurement as the only violation of section 2511(1)(a-d) that is exempt from civil liability.

A more reasonable explanation for leaving "procure" out of section 2520(a) is that it would have been redundant when Congress rewrote that section, because "procure" is already subsumed in the broader term "intercept." Recognizing a civil cause of action for procuring an interception is also more faithful to Congress' intent to provide "comprehensive" protection and "strike at all aspects of the problem" of illegal wiretapping. It also avoids the anomaly of Congress providing a right without a civil remedy.

There is nothing in the legislative history to suggest that Congress intended the amendment to eliminate a civil cause of action that had previously existed. Instead, the entire focus

of the amendment was to provide *additional* protections and remedies by *adding* electronic communications to the classes of information covered by the wiretap act. 1986 U.S.C.C.A.N. 3555. There is no legal (or logical) reason wrongdoers (like WFAA and Riggs) should be able to shield themselves from civil liability simply by finding someone else (like the Harmans) to do their "dirty business."[1]

B. The Statutory Suppression Rule of 18 U.S.C. § 2515 Prohibits a Defendant in a Civil Lawsuit from Introducing the Contents of Illegally Intercepted Communications into Evidence to Defend Against State Law Claims or to Support Affirmative Defenses to Liability Under the Federal Wiretap Act.

The district court correctly ruled that the Peavys' calls were intercepted in violation of the federal wiretap act. Pet. App. 81a, 92a. Based upon that ruling, the plain language of the federal wiretap act absolutely prohibits WFAA and Riggs from introducing or using the contents of the tapes against the Peavys in any court proceeding:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a

1. *Gelbard v. United States*, 408 U.S. 41, 63 (1972) (Douglas, J., concurring) (referring to illegally intercepting telephone calls as "dirty business").

> political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2515.

Section 2515 was enacted to promote three important policies: protect the privacy of communications, prevent exploitation of the fruits of illegal activity, and ensure that courts do not become partners to illegal activity. 1968 U.S.C.C.A.N. at 2156, 2184; *Gelbard v. United States*, 408 U.S. 41, 50-51 (1972). According to this Court, the language of 18 U.S.C. § 2515 is "unequivocal." *Gelbard*, 408 U.S. at 47. Although numerous courts have considered the sound reasoning behind this so-called "statutory exclusionary rule" in both the criminal and civil context, the seminal case is *Gelbard*, in which this Court refused to allow witnesses before a grand jury to be questioned about the contents of an alleged illegal wiretap. In that case, this Court gave a lengthy explanation of the rationale and application of the exclusionary rule, including the following:

> Section 2515 is thus central to the legislative scheme. *Its importance as a protection for 'the victim of an unlawful invasion of privacy' could not be more clear.* [FN9]
>
> * * *
>
> Moreover, § 2515 serves not only to protect the privacy of communications, [FN10] but also to ensure that the courts do not become partners to

illegal conduct: *the evidentiary prohibition was enacted also 'to protect the integrity of court and administrative proceedings.'*

FN9. '*Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter.* It provides that intercepted wire or oral communications or evidence derived therefrom may not be received in evidence in any proceeding before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State, where the disclosure of that information would be in violation of this chapter. . . . *(I)t is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy.* The provision thus forms an integral part of the system of limitations designed to protect privacy. *Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications.*' *Id.*, at 96; U. S. Code Cong. & Admin. News 1968, p. 2184 (citations omitted).

FN10. Congressional concern with the protection of the privacy of communications is evident also in the specification of what is to be protected. 'The proposed legislation is intended to protect the privacy of the communication itself. . . .' Id., at 90; U. S. Code Cong. & Admin. News 1968, p. 2178. *'As defined in Title III, 'contents,'*

> *when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication.'* 18 U.S.C. § 2510(8). *'The definition thus 'include(s) all aspects of the communication itself. No aspect, including the identity of the parties, the substance of the communication between them, or the fact of the communication itself, is excluded. The privacy of the communication to be protected is intended to be comprehensive.'* S. Rep. No. 1097, supra, at 91; U. S. Code Cong. & Admin. News, p. 2179.

Gelbard, 408 U.S. at 50-51 (emphasis added).

The district court referred to the so-called "adjudication exception," which was recognized in *Williams v. Poulos*, 11 F.3d 271, 289 (1st Cir. 1993). In establishing that exception, the court stated:

> Moreover, we think that Congress, in enacting Sec. 2515, . . . made clear its endorsement of disclosures and/or uses of illegally intercepted material for the adjudicatory purposes contemplated by the district court. As noted, Sec. 2515 bans the introduction into evidence of both illegally intercepted material and any evidence derived therefrom. *Implicit in this ban, we believe, are two assumptions: (1) that the intercepted material will be presented to a court or jury for an initial adjudication of whether it was acquired illegally; and (2) that a court will*

> *thereafter determine whether other evidence was derived from the intercepted evidence.* Simply put, we are at a loss to see how these functions could be performed without the types of adjudicatory "disclosures" and/or "uses" that plaintiffs view as banned by Title III.

Williams, 11 F.3d at 289 (emphasis added). Likewise, the Fifth Circuit has recognized that the legislative history behind Title III indicates that "disclosure would be necessary in the investigation and prosecution of the illegal wiretapper himself." *Forsyth v. Barr*, 19 F.3d 1527, 1544 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994).

The district court's opinion demonstrates that WFAA and Riggs offered (and Magistrate Judge Kaplan considered) the contents[2] of the Peavys' illegally intercepted conversations, and evidence derived from them, for purposes far beyond those contemplated by the adjudication exception. Pet. App. 64a-66a, 74a-76a. First, WFAA and Riggs offered the contents to try to convict the Peavys of wrongdoing and to try to show that the Peavys are such bad people that they don't have rights worthy of protection. Pet. App. 64a-66a. Not a single reported opinion has used the adjudication exception to permit a wrongdoer to attack the character of his victim. To do so would be to reward the wrongdoer by allowing him to reap the fruits of his illegal activity and would make the court a partner to the illegal activity. 1968 U.S.C.C.A.N. at 2156; *Gelbard*, 408 U.S. at 50-51.

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2. The term "contents" as used in the federal wiretap act includes the illegally intercepted communication itself, together with any information concerning the substance, purport, or meaning of that communication. 18 U.S.C. § 2510(8). The Cross-Petitioners intend for it to have the same meaning in this Cross-Petition.

Second, WFAA and Riggs offered the contents of the Peavys' illegally intercepted conversations, and evidence derived from them, to try to defeat the Peavys' state law claims, which are wholly independent of federal wiretap act claims. Pet. App. 103a. By its very terms, the adjudication exception does not cover the Peavys' non-wiretap claims. Finally, WFAA and Riggs offered the contents of the Peavys' illegally intercepted conversations, and evidence derived from them, to try to prove their affirmative defenses. *Id.* at 91a, 93a-94a. Not a single reported opinion has recognized an exception to section 2515 to allow a defendant to prove an affirmative defense to any kind of claim.

Once the district court found that the Peavys' calls were illegally intercepted (Pet. App. 81a, 92a) and that the Harmans, WFAA, and Riggs all used and disclosed the contents of the illegally intercepted calls in violation of the federal wiretap act (*Id.* at 90a), the limited purposes of the adjudication exception were fully served. No further consideration of the contents of the conversations, or evidence derived from them, was necessary or permissible.

The Fifth Circuit declined to rule on this issue, because the district court's ruling was only for summary judgment purposes. Pet. App. 59a. However, the suppression rule of section 2515 is not limited to any particular stage of proceedings — it applies to "any trial, hearing, or other proceeding in or before any court." 18 U.S.C. § 2515. Furthermore, the Federal Rules of Civil Procedure limit the evidence that can be admitted in summary judgment proceedings to "such facts as would be admissible in evidence" at trial. Fed. R. Civ. P. 56(e). The exception implicitly recognized by the Fifth Circuit would swallow the rule in cases where wrongdoers (like WFAA and Riggs)

could use the contents of illegally intercepted conversations to defeat the claims of victims (like the Peavys) at the summary judgment stage of a case (like the district court ruled in this case). The Fifth Circuit's ruling, together with the rationale for its ruling, set an erroneous and dangerous precedent for civil cases under the federal wiretap act.

CONCLUSION

If the Court grants the Petition for Writ of Certiorari, then the Court should also grant this Conditional Cross-Petition for Writ of Certiorari for all of the foregoing reasons.

Respectfully submitted,

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FEB 9 2001

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RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI

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February 9, 2001

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CORPORATE DISCLOSURE STATEMENT

WFAA-TV, Inc. is now WFAA-TV, L.P. Its general partner is WFAA-TV of Texas, Inc., and its limited partner is WFAA Holdings, Inc. Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that the A.H. Belo Corporation, a publicly held corporation, owns more than 10% of its stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

RESPONSE TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI 1

ARGUMENT 2

I. THE FIFTH CIRCUIT CORRECTLY HELD THAT THERE IS NO PRIVATE RIGHT OF ACTION FOR "PROCUREMENT." 2

II. THE FIFTH CIRCUIT PROPERLY DECLINED TO REVIEW THE STATUTORY SUPPRESSION ISSUE 4

CONCLUSION 9

TABLE OF AUTHORITIES

Cases: **Page**

Bartnicki v. *Vopper*, No. 99-1687 1
Lindsey v. Normet, 405 U.S. 56 (1972) 5
McQuade v. *Michael Gassner Mechanical & Elec. Contractors, Inc.*, 587 F. Supp. 1183 (D. Conn. 1984) .. 6
Nix v. *O'Malley*, 160 F.3d 343 (CA6 1998) 6
Steve Jackson Games v. *United States Secret Service*, 36 F.3d 457 (CA5 1994) 8
Stone v. *INS*, 514 U.S. 386 (1995) 3
United States v. *Burroughs*, 564 F.2d 1111 (CA4 1977) 8
United States v. *Caron*, 474 F.2d 506 (CA5 1973) 7
United States v. *Echavarria-Olarte*, 904 F.2d 1391 (9th Cir. 1990) 6-7
United States v. *Gonzales*, 520 U.S. 1 (1997) 4
United States v. *Havens*, 446 U.S. 620 (1980) 7
United States v. *Liddy*, 354 F. Supp. 217 (D.D.C. 1973), *rev'd in part*, No. 73-1020 (CADC Jan. 19, 1973) 6
United States v. *Murdock*, 63 F.3d 1391 (CA6 1995) 8
United States v. *Underhill*, 813 F.2d 105 (CA6), *cert. denied*, 482 U.S. 906 (1987) 6
United States v. *Vest*, 813 F.2d 477 (CA1 1987) 7
United States v. *Vopper*, No. 99-1728 1
United States v. *Winter*, 663 F.2d 1120 (CA1 1981), *cert. denied*, 460 U.S. 1011 (1983) 7
Walder v. *United States*, 347 U.S. 62 (1954) 7
Williams v. *Poulos*, 11 F.3d 271 (CA1 1993) 6

Statutes: **Page**

18 U.S.C. § 2511 ..... 1, 4, 5
18 U.S.C. § 2515 4-8
18 U.S.C. § 2518 8
18 U.S.C. § 2520 2-3

Miscellaneous: **Page**

S. Rep. No. 1097, 90th Cong., 2d Sess.,
reprinted in 1968 U.S.C.C.A.N. 2112 5

RESPONSE TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-petitioners Dan and Sally Peavy have filed a conditional cross-petition raising two questions:

Whether the Fifth Circuit correctly held that the federal wiretap statute, 18 U.S.C. § 2510 *et seq.*, does not create a private right of action for "procuring" another person to intercept a wire, oral, or electronic communication.

Whether the Fifth Circuit properly declined to rule on petitioners' argument that the statutory suppression rule of 18 U.S.C. § 2515 prohibits a defendant in a civil lawsuit from introducing the contents of illegally intercepted communications into evidence to defend against state-law claims or to support affirmative defenses to liability under the federal wiretap act.

Although the Fifth Circuit's judgment with respect to these issues was plainly correct, and although the Peavys have not identified any relevant circuit conflicts, cross-respondents WFAA-TV and Robert Riggs do not oppose the grant of certiorari on these questions. WFAA-TV and Riggs have themselves petitioned for certiorari concerning two different aspects of the Fifth Circuit's decision:

(1) the Court of Appeals' holding that the First Amendment permits the imposition of civil liability on a media defendant under 18 U.S.C. § 2511(1)(c) and (d), and a parallel Texas state wiretap statute, for using or disclosing the contents of illegally intercepted communications – a question similar to that presented in *Bartnicki* v. *Vopper*, No. 99-1687, and *United States* v. *Vopper*, No. 99-1728, *cert. granted*, 120 S. Ct. 2716 (June 26, 2000) (oral argument Dec. 5, 2000); and

(2) the Fifth Circuit's holding that 18 U.S.C. § 2511(1)(c) and (d), which require a showing that the defendant "know[s] or ha[s] reason to know that the information was obtained . . . in violation of this subsection," permit the imposition of liability even if the defendant can show, on the basis of advice from law

enforcement officials, legal counsel, or similarly authoritative sources of information, that he was not aware of the statutory prohibition.

The questions presented by WFAA-TV and Riggs are important questions of federal law with respect to which this Court's review is urgently required. After granting certiorari on the questions presented by WFAA-TV and Riggs, this Court may wish to consider the full array of statutory interpretation issues arising under the federal wiretap law. According, WFAA-TV and Robert Riggs do not oppose the grant of certiorari on the questions presented by the Cross-Petition, although the Peavys' legal arguments have no merit.

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY HELD THAT THERE IS NO PRIVATE RIGHT OF ACTION FOR "PROCUREMENT."

The Fifth Circuit correctly held that the federal wiretap statute, 18 U.S.C. § 2510 *et seq.*, does not create a private right of action for "procuring" another person to intercept a wire, oral, or electronic communication. Pet. App. in No. 00-691, at 10a-12a. The question is resolved by the statutory text of the provision authorizing a civil damages remedy, 18 U.S.C. § 2520. Prior to its amendment in 1986, that provision stated:

> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, *or procures any other person to intercept, disclose, or use such communications*, and (2) be entitled to recover from any such person [damages, attorney's fees, and costs].

18 U.S.C. § 2520 (1970) (emphasis added). But the "or procures

any other person" language was deleted when the section was amended in 1986. Pet. App. in No. 00-691, at 10a-11a. As amended, § 2520 currently provides, in pertinent part, that

> any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

18 U.S.C. § 2520(a) (Supp. 2000).

Thus, in 1986 Congress deleted the statutory language authorizing a private right of action for "procuring" an interception. Civil liability under 18 U.S.C. § 2520(a) extends only to "the person or entity which engaged in *that violation*." (emphasis added). The "violation" in question is defined as "intercept[ing], disclos[ing], or intentionally us[ing]" a communication – not as "procuring" another person to engage in such conduct. As the Fifth Circuit observed, "'that violation' refers only to illegal interception, disclosure, or use, and not to procuring interception by another." Pet. App. in No. 00-691, at 12a. "[T]here is no mention" in the civil remedy provision of liability for "procuring." *Id.*

The Fifth Circuit's conclusion is plainly correct and does not conflict with any decision by any other court identified by the Peavys. The court of appeals faithfully applied the principles of statutory construction established by this Court and gave meaning to the 1986 congressional amendment. See *Stone* v. *INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

The Peavys' criticism of the Fifth Circuit's decision is flawed. The Peavys contend that the phrase "that violation" in § 2520(a) refers not to the earlier part of the same sentence in § 2520(a) but instead to *another* section of the wiretap act

(§ 2511(1)(a-d)) located some nine statutory provisions away. Cross-Pet. at 8. Plainly, there is no grammatical or logical basis for the suggestion that the antecedent for the phrase "that violation" is located in such a distant place in the statute.

The Peavys also contend, citing the legislative history of the 1986 amendment, that the Fifth Circuit's decision does not promote Congress' intent. Cross-Pet. at 8-11. But the Peavys cannot adduce any legislative history indicating that Congress meant to retain a *civil* remedy for "procuring." Moreover, it is impermissible in this case to resort to legislative history to vary the meaning of the statutory text because, "[g]iven the straightforward statutory command, there is no reason to resort to legislative history." *United States* v. *Gonzales*, 520 U.S. 1, 6 (1997). In any event, the Fifth Circuit's interpretation fully effectuates the statutory purpose of the wiretap statute, as well as the portion of § 2511(1)(a) prohibiting "procuring," because the statutory ban on "procuring" interception by another person is enforced through *criminal* proceedings rather than through private *civil* remedies.

The court of appeals was thus correct in holding that there is no federal private right of action for "procuring" an interception under the federal wiretap act.

II. THE FIFTH CIRCUIT PROPERLY DECLINED TO REVIEW THE STATUTORY SUPPRESSION ISSUE.

The Fifth Circuit properly declined to rule on petitioners' argument that 18 U.S.C. § 2515 prohibits a defendant in a civil lawsuit from introducing the contents of illegally intercepted communications into evidence to defend against state-law claims or to support affirmative defenses to liability under the federal wiretap act. The Fifth Circuit held that, "[i]n light of our disposition of the other issues" – such as the First Amendment and scienter questions on which WFAA and Riggs have sought certiorari – "we need not address this issue." Pet. App. in No. 00-691, at 59a.

Even if the Fifth Circuit had reached the merits of the statutory suppression issue, it would have been justified in rejecting the Peavys' argument. Section 2515 does not apply in the same proceeding in which a plaintiff is seeking to establish a violation of the federal wiretap statute. Before a court can decide whether there has been a violation of the wiretap statute, it must consider the contents of an intercepted electronic communication in order to determine whether the defendant has "used" or "disclosed" the substance of that communication, and whether the defendant may avail himself of any affirmative defenses. It would put the cart before the horse to *assume*, at the outset, that a violation of the wiretap statute has occurred. See S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112, 2188 ("For example, such use and disclosure would be necessary in the investigation and prosecution of an illegal wiretapper himself.").

The need to consider the contents of a media defendant's expression is particularly acute in a case like this, where the defendant did not broadcast any intercepted communications verbatim but rather is alleged only to have divulged the contents of the interception by means of *other* news reports. That is precisely why WFAA and Riggs have urged that the prohibition of 18 U.S.C. § 2511 is properly subject to strict scrutiny as a content-based restriction on speech.

Indeed, application of Section 2515 in the manner proposed by the Peavys would violate defendants' right to be heard in their own defense and would therefore infringe the right to due process guaranteed under the Fifth Amendment. The Peavys may not seek millions of dollars from WFAA and Riggs based on the Harman tapes and then rely on Section 2515 to thwart their ability to defend against these baseless charges. "Due process requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (citation omitted).

Accordingly, the Peavys' construction of Section 2515 has no basis in statutory text or purpose, nor is it consistent with due process. Every court to have considered the issue has concluded that the statutory suppression rule does not prevent a court from examining the intercepted communication in order to determine whether there has been a violation of the federal wiretap statute. The First Circuit held, in a decision endorsed by the Peavys (see Cross-Pet. at 14-15), that the statute assumes "(1) that the intercepted material will be presented to a court or jury for an initial adjudication of whether it was acquired illegally; and (2) that a court will thereafter determine whether other evidence was derived from the intercepted evidence." *Williams* v. *Poulos*, 11 F.3d 271, 289 (CA1 1993); see also *Nix* v. *O'Malley*, 160 F.3d 343, 351 (CA6 1998) (noting judicial recognition of "an implied 'adjudication exception' that permits disclosure of intercepted material to a court for admissibility determinations and to a court or jury for a resolution of illegality"); *United States* v. *Underhill*, 813 F.2d 105, 112 (CA6), *cert. denied*, 482 U.S. 906 (1987) (ruling intercepted communications admissible because suppression "would produce an absurd result that we are confident Congress did not intend"); *McQuade* v. *Michael Gassner Mechanical & Elec. Contractors, Inc.*, 587 F. Supp. 1183, 1188, 1190-91 (D. Conn. 1984) ("Section 2515 was no more designed to keep defendants in lawsuits brought under § 2520 from defending the alleged violations of § 2511 than it was to keep the Government from prosecuting violators under § 2511"; "If the court were to accept the position urged by plaintiffs * * * plaintiffs themselves would be seriously hampered, if not completely foreclosed, from proving their case at trial."); *United States* v. *Liddy*, 354 F. Supp. 217, 220 (D.D.C. 1973), *rev'd in part*, No. 73-1020 (CADC Jan. 19, 1973) (allowing admission of intercepted communications).

Moreover, numerous courts have allowed the disclosure and use of the contents of illegally intercepted communications in order to impeach testifying criminal defendants. See *United*

States v. *Echavarria-Olarte*, 904 F.2d 1391, 1397 (9th Cir. 1990); *United States* v. *Vest*, 813 F.2d 477, 484 (CA1 1987); *United States* v. *Winter*, 663 F.2d 1120, 1154 (CA1 1981), *cert. denied*, 460 U.S. 1011 (1983); *United States* v. *Caron*, 474 F.2d 506, 508 (CA5 1973). By analogy, evidence obtained in violation of the Fourth Amendment can be used for the limited purpose of attacking a testifying defendant's credibility. See *United States* v. *Havens*, 446 U.S. 620, 627 (1980); *Walder* v. *United States*, 347 U.S. 62, 65 (1954).

The Peavys contend that the district court considered the contents of the intercepted communications for purposes beyond those contemplated by these established exceptions. Cross-Pet. at 15. The record does not support that assertion. Rather, the district court considered the contents of the tapes only in deciding whether the tapes involved matters of public significance, Pet. App. in No. 00-691, at 93a-94a – a holding that the Peavys did not even challenge on appeal. Hence, the district court's denial of the motion to suppress had no impact on the Peavys.

Contrary to the Peavys' claim, the district court nowhere indicated that it would consider the contents "to show that the Peavys are such bad people that they don't have rights worthy of protection." Cross-Pet. at 15. Nor did the district court consider the contents of the communications as part of WFAA's affirmative defenses to the Peavys' state-law claims. Rather, the district court considered the contents only in the course of deciding whether the *Peavys* had made out the elements of a state-law claim of public disclosure of embarrassing private facts. Under Texas law, it was the Peavys' burden to demonstrate that "the publicized information contains highly intimate or embarrassing facts" and that "the publication of this information would be highly objectionable to a reasonable person." Pet. App. in No. 00-691, at 103a. The Peavys can hardly complain about this aspect of the district court's decision, which was triggered by a state common-law claim that the

Peavys themselves had decided to pursue. In any event, the Peavys did not appeal the district court's dismissal of their state common-law claims, so those claims are no longer at issue in this case.

Hence, even if the Fifth Circuit had reached the merits of the statutory suppression issue, it would have been compelled to affirm the district court's judgment.[1]

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[1] Because the Fifth Circuit did not reach the question presented by the Peavys, it did not decide the additional grounds offered by WFAA and Riggs for affirming the district court's denial of the Peavys' motion to suppress: Section 2515 is not applicable against parties who lawfully receive a tape of an intercepted communication, such as WFAA and Riggs. *United States* v. *Murdock*, 63 F.3d 1391 (CA6 1995) (upon which the Government relied in defeating Peavy's motion to suppress in a criminal trial). In addition, Section 2515 is not applicable in this case because the radio frequencies intercepted by the Harman's police scanner were electronic communications, 18 U.S.C. §§ 2515, 2510(10)(a); *Steve Jackson Games* v. *United States Secret Service*, 36 F.3d 457, 461 (CA5 1994); because the Peavys failed to show that the intercepted calls affected interstate or foreign commerce, as required by § 2510(1), (12); *United States* v. *Burroughs*, 564 F.2d 1111, 1113-14 (CA4 1977); and because many significant aspects of the Harman tapes have become public knowledge as a result of Peavy's public criminal proceedings. These alternative grounds remain available to WFAA and Riggs as reasons for affirming the district court's denial of the motion to suppress.

CONCLUSION

The petition for certiorari in No. 00-691 should be granted. WFAA and Riggs have no objection to this Court's granting review of the questions presented in the Cross-Petition, although the Peavys' legal arguments have no merit.

Respectfully submitted.

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February 9, 2001